UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

John F. Lawrence	:	
	:	
v.	:	**3:03cv850 (JBA)**
	:	
The Richman Group Of Connecticut, LLC	:	
	:	

Ruling on Defendant's Motion to Dismiss [Doc. # 28]

Defendant The Richman Group of Connecticut, LLC moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Counts II (Breach of the Implied Covenant of Good Faith and Fair Dealing), III (Conversion), IV (Tortious Interference) and V (Fraud) of Plaintiff John F. Lawrence's Second Amended Complaint. For the reasons discussed below, defendant's motion is granted in part and denied in part.

I. Background

Plaintiff John R. Lawrence ("Lawrence") is a stock broker licensed with the National Association of Securities Dealers. Defendant The Richman Group of Connecticut, LLC ("TRG" or "TRGCT") is "a syndicator of real estate limited partnerships, styled as investments funds, created as vehicles for investment by institutional investors." Second Amended Complaint [Doc. # 27] at ¶ 6. Lawrence's claims arise out of TRG's use of other third party brokers to market TRG's investment funds, which Lawrence alleges is contrary to his mutual exclusivity agreement

with TRG, and deprived him of commissions to which he is entitled.

As set forth in Lawrence's Second Amended Complaint, Lawrence approached TRG in late 1997 or early 1998 with an investment fund concept known as the "Bank Fund" which would "enable institutional banking investors to invest in affordable housing located in specifically targeted geographic areas." Second Amended Complaint [Doc. # 27] at ¶ 7. TRG's Executive Vice President Stephen Smith ("Smith") agreed that TRG would syndicate the Bank Fund if Lawrence could introduce institutional banking investors willing to invest an aggregate of at least twenty million dollars, and that Lawrence would have "the exclusive right to market to institutional banking investors nationwide any investment funds syndicated by TRGCT or its affiliates, including the Bank Fund." See id. at ¶ 11.

After Lawrence discovered that Beacon Hill Capital Corporation ("Beacon Hill"), a third-party broker/dealer, had contacted institutional banking investors about investing in the Bank Fund, Smith and Lawrence created a "Registered Client" list "wherein the institutional banking investors that Lawrence contacted regarding investing in the Bank Fund were listed as Lawrence's clients." Id. at ¶ 18. Beginning in August 1998 through early 1999, Smith and Lawrence came to an agreement whereby Lawrence was given the exclusive right to market any TRG

Funds, including Bank Fund, to his Registered Clients (with the exception of Comerica and U.S. Bancorp which also could be solicited by Beacon Hill Capital Corporation, a third party broker), and in return Lawrence agreed that he "would perform services exclusively for TRG and he would not introduce any institutional banking investors to any other syndicator." Id. at ¶ 22. Smith agreed that TRG would compensate Lawrence with a commission of $12,500 for each one million dollar limited partnership unit of Bank Fund sold to the Lawrence Registered Clients, and $7,500 for each one million dollar limited partnership unit of any other TRG Fund sold to the Lawrence Registered Clients. Id. at ¶¶ 25, 26. Lawrence states that he "performed services exclusively for TRG and did not introduce any institutional banking investors to any other syndicator," id. at ¶ 22, and "did not pursue opportunities to develop and market competing investment products with other syndicators," id. at ¶ 32, but that TRG breached its exclusivity agreement with Lawrence by using other brokers to solicit Lawrence Registered Clients to invest in its Funds. In particular, in early 2001 Lawrence learned that Williams Traylor, hired in January 2001 as President of TRG New York, had communications with certain of the Lawrence Registered Clients, whereupon, Lawrence believes, "on at least one occasion, sales commissions were returned to the Lawrence Registered Client after the sales commissions already had been

collected which otherwise would have been retained." Id. at ¶ 41. Lawrence states that the reduction or elimination of sales commissions made investing in the TRG Funds more attractive to the Lawrence Registered Clients. See id. at ¶ 42. Further, Lawrence alleges, upon information and belief, that TRG retained other third-party brokers, including Capstar Partners, to solicit investments in TRG Funds from Lawrence Registered Clients, and had agreements in place with these brokers "as of late 1997, as of early 1998, as of late 1998 and/or as of early 1999." See id. at ¶¶ 45, 46. Lawrence believes that TRG "intended to have those brokers and/or broker/dealers market the TRGCT Funds to institutional banking investors contrary to Smith's statements to Lawrence that Lawrence would have the exclusive right to market the TRGCT Funds to institutional banking investors and the Lawrence Registered Clients." Id. at ¶ 47. As a result of TRG's conduct, Lawrence alleges that he has been denied compensation that is due to him.

II. Standard

When deciding a 12(b)(6) motion to dismiss, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the pleader. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of

his claim which would entitle him to relief. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513-14 (2002); Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

III. Discussion

Defendant moves to dismiss all of the tort claims in Lawrence's complaint, including Count V (fraud), Count II (breach of the implied covenant of good faith and fair dealing), Count III (conversion), and Count IV (tortious interference), arguing that they fail to state claims on which relief may be granted because "each is simply a dressed up breach of contract claim." Memorandum in Support of Defendant's Motion to Dismiss [Doc. # 29] at 1. In particular, TRG argues that Lawrence fails to plead fraud with the requisite particularity under Fed. R. Civ. P. 9(b), fails to plead facts rising to the level of bad faith, fails to plead ownership to any property subject to the conversion claim, and fails to identify any prospective transaction with which TRG tortiously interfered. In his response to TRG's motion, Lawrence withdrew his tortious interference claim. The Court will address the remaining

arguments in turn.

A. Fraud

The crux of Lawrence's fraud claim is that TRG instructed or agreed that Traylor and certain third party brokers would solicit investors from Lawrence's Registered Client list to invest in TRG Funds, while representing to Lawrence that he would be the exclusive broker of TRG Funds to these clients, thereby inducing Lawrence to bring his Bank Fund concept to TRG and to forego soliciting these clients to invest in other, non-TRG Funds. Defendant argues that Lawrence's complaint is deficient in two respects: (1) there is no allegation that TRG knew its representations to Lawrence were fraudulent at the time the statements were made; and (2) the allegations about why representations TRG made to him were fraudulent were based only "upon information and belief."

Fed. R. Civ. P. 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Rule 9(b)'s particularity requirement is met where the complaint "(1) detail[s] the statements . . . that the plaintiff contends are fraudulent, (2) identif[ies] the speaker, (3) state[s] where and when the statements . . . were made, and (4) explain[s] why the statements . . . are fraudulent." Olsen

v. Pratt & Whitney Aircraft, 136 F.3d 273, 275 (2d Cir. 1998) (citation and internal quotation marks omitted).

1. Scienter

What distinguishes a fraud claim from a simple breach of contract claim is some allegation of intent to deceive at the time TRG entered into the agreement with Lawrence. Although Rule 9(b) permits scienter to be averred generally, in this Circuit plaintiffs are not relieved of their burden of "pleading circumstances that provide at least a minimal factual basis for their conclusory allegations of scienter." Connecticut Nat. Bank v. Fluor Corp., 808 F.2d 857, 862 (2d Cir. 1987). These facts must "give rise to a strong inference of fraudulent intent." Novak v. Kasaks, 216 F.3d 300, 308 (2d Cir. 2000). "The requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994) (citations omitted). "Motive would entail concrete benefits that could be realized by one or more of the false statements . . . . Opportunity would entail the means and likely prospect of achieving concrete benefits by the means alleged." Novak, 216 F.3d at 308 (citations omitted).

Lawrence has alleged that he agreed to "perform services exclusively for TRG and that he would not introduce any institutional banking investors to any other syndicator," Second Amended Complaint [Doc. # 27] at ¶ 22. This assurance of exclusivity provided a clear benefit to TRG, as it removed one avenue of competition. TRG was assured that Lawrence, having cultivated his relationships with the institutional banking investors on his Registered Client list, would not then market non-TRG funds to these investors. This allegation establishes a plausible motive for TRG to falsely represent to Lawrence that in exchange for his exclusivity, TRG would give Lawrence the exclusive right to market TRG Funds to institutional banking investors on the Lawrence Registered Client list. In this context, defendant's argument that no motive to deceive can be inferred because TRG's interests and Lawrence's interests were aligned is unavailing. TRG argues that "TRG wanted Lawrence to succeed in finding bank fund investors who, hopefully would not also invest with TRG's syndication competitors." Defendant's Reply Memorandum in Further Support of Its Motion to Dismiss [Doc. # 35] at 4. The premise of defendant's argument is that Lawrence Registered Clients would invest in TRG Funds regardless of whether Lawrence or some other third party broker solicited them. This premise is not self-evident, as it certainly may be assumed that more brokers marketing TRG's Funds could be more

beneficial to TRG than only one broker, and that Traylor or third party brokers had relationships with investors that would be valuable to TRG in encouraging their investment in TRG Funds. Because Lawrence has alleged that TRG represented to him that he would be the exclusive broker for TRG Funds, and that based on this representation he agreed to bring the Bank Fund concept to TRG and provide exclusive services to TRG, he has identified concrete benefits that TRG could realize by falsely promising exclusivity, and thus sufficiently alleged a motive to deceive.

The issue of whether Lawrence sufficiently alleged an opportunity to deceive is more difficult. Lawrence essentially alleges that TRG had the means to achieve the benefit of one-sided exclusivity by secretly instructing and consenting that Traylor and third party brokers would solicit Lawrence Registered Clients to invest in TRG Funds. Lawrence's complaint, however, states that Traylor was not hired by TRG until 2001, over two years after the alleged mutual exclusivity agreement with Lawrence took place. At the time the agreement with Lawrence was entered into, TRG is not alleged to have retained Traylor to solicit Lawrence Registered Clients, nor is TRG alleged to have been in any contact whatsoever with Traylor. Thus, there is no allegation that at the time TRG entered into its agreement with Lawrence that TRG had the means, by use of Traylor, to obtain the benefit alleged. Because the requisite "strong inference" of

fraud requires both motive and opportunity to commit fraud, the allegations regarding Traylor are insufficiently pled.

The basis for a finding that TRG had the opportunity to commit the fraud alleged thus rests exclusively on Lawrence's allegations about the third party brokers. Lawrence alleges that TRG had agreements in place with third party brokers "as of late 1997, as of early 1998, as of late 1998 and/or as of early 1999." This allegation becomes the key to his complaint, as it would clearly demonstrate that TRG had the opportunity to commit fraud at the time it entered into its mutual exclusivity agreement with Lawrence. But with only the allegations involving the third party brokers left as relevant to Lawrence's fraud claim, defendant's second argument about allegations made "upon information and belief" takes on greater consequence.

2. "Information and Belief"

To satisfy Rule 9(b), a complaint must identify with particularity the statements alleged to be fraudulent, who the speaker was, where and when the statements were made, and why the statements are claimed to be fraudulent. Lawrence's complaint satisfies the first three particularity requirements by alleging that Smith, acting on TRG's behalf, told Lawrence in August 1998 through early 1999 that he would have the exclusive right to solicit investors from the Lawrence Registered Client list to invest in the various TRG Funds, but Lawrence's allegations of

the falsity of these statements, i.e. that TRG allowed Traylor and third party brokers to solicit Lawrence Registered Clients to invest in TRG funds, are based only "upon information and belief." "[A]llegations of fraud cannot ordinarily be based 'upon information and belief,' except as to "matters peculiarly within the opposing party's knowledge." Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 379 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975). "While the rule is relaxed as to matters peculiarly within the adverse parties' knowledge, the allegations must then be accompanied by a statement of the facts upon which the belief is founded." Segal v. Gordon, 467 F.2d 602, 608 (2d Cir. 1972); see also DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987), Stern v. General Elec. Co., 924 F.2d 472, 477 (2d Cir. 1991).

Here, whether third party brokers marketed the TRG funds to Lawrence's Registered Clients are facts peculiarly within TRG's knowledge and the knowledge of the third party brokers, all of whom have interests adverse to Lawrence's on this matter. Lawrence, therefore, would not necessarily have access to this information. Nonetheless, his allegations "upon information and belief" would satisfy Rule 9(b) only if he has alleged the facts which give rise to his "information and belief." Lawrence's allegations are wholly deficient in this regard. Lawrence's complaint is devoid of any explanation of the basis for his

belief that other third party brokers and broker-dealers, such as Capstar Partners, solicited Lawrence Registered Clients. Without this factual basis, his allegations with regard to the actions taken by third party brokers are insufficient.[1]

Having found Lawrence's allegations with respect to Traylor to be irrelevant to Lawrence's fraud claim, and his allegations "upon information and belief" with respect to the third party brokers to be deficient, Lawrence's complaint fails to satisfy Rule 9(b). Accordingly, the Court concludes that Count V (Fraud) fails to state a claim, and must be dismissed.

B. Bad Faith

Count III of plaintiff's Second Amended Complaint claims that TRG breached its implied covenant of good faith and fair dealing contained in its contract with Lawrence. The parties disagree whether Connecticut or Maryland law governs this claim, and as Connecticut's and Maryland's substantive law on this issue

[1]The absence of facts giving rise to Lawrence's belief about the third party brokers can be contrasted to Lawrence's inclusion of some factual basis for his allegations on "information and belief" with regard to Traylor. In particular, Lawrence alleges that "[i]n early 2001, Lawrence discovered that Traylor had had communications with certain of the Lawrence Registered Clients . . . ." Second Amended Complaint [Doc. # 27] at ¶ 40. Given Traylor's position as President of TRG New York, his communication with Lawrence Registered Clients could give rise to a reasonable inference that he was soliciting Lawrence's Registered Clients. Nonetheless, as discussed above, Traylor is not relevant to Lawrence's fraud allegations because there is no allegation that TRG was aware of his existence at the time the alleged fraudulent statements were made.

differ, the choice of law issue needs resolution.

Both Connecticut and Maryland recognize an implied covenant of good faith and fair dealing in contracts, but Maryland appears, on the one hand, to set narrower limits on the scope of implied covenants, and on the other hand, to employ a more flexible definition of "good faith." The Fourth Circuit Court of Appeals, surveying Maryland state law, concluded that "the covenant is limited to prohibiting one party from acting in such a manner as to prevent the other party from performing his obligations under the contract. The covenant does not extend to imply a general duty of good faith and fair dealing in the performance of obligations under the contract that do not implicate or impair another party's performance under the contract." Edell & Associates, P.C. v. Law Offices of Peter G. Angelos, 264 F.3d 424, 444 (4th Cir. 2001) (citing Eastern Shore Markets, Inc. v. J.D. Associates, 213 F.3d 175, 182-83 (4th Cir. 2000)). "Under certain circumstances, the covenant of good faith and fair dealing as recognized in Maryland includes an implied duty to refrain from destructive competition," Eastern Shore Markets, 213 F.3d at 183, which "obligates each party 'not to render valueless his contract with [the other party] by permitting ... destructive competition.'" Id. (quoting Automatic Laundry Service, Inc. v. Demas, 141 A.2d 497, 501 (Md. 1958)).

While the scope of the implied covenant under Maryland law

is limited to actions by one party that prevent the other party to the contract from fulfilling his or her obligations, the good faith standard itself appears to be broad, and largely one of "reasonableness." In Atlantic Contracting & Material Co., Inc. v. Ulico Casualty Co., 380 Md. 285 (2004), for example, the Court of Appeals of Maryland concluded that "a standard of reasonableness . . . should be implied in the good faith analysis of a surety's actions in determining whether it may recover against the principal," thereby rejecting the constrained good faith standard of "absence of fraud." Id. at 307-08. Similarly, in Julian v. Christopher, 320 Md. 1, 9 (1990), the Maryland Court of Appeals concluded that in a lease agreement, the covenant of good faith and fair dealing implies a "reasonableness standard."

Connecticut, by contrast, recognizes an implied covenant of good faith and fair dealing in a wide variety of contracts. See Buckman v. People Express, Inc., 205 Conn. 166, 170 (1987) (citations omitted). "To constitute a breach of that covenant, the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." Alexandru v. Strong, 81 Conn. App. 68, 80-81 (Conn. App. 2004). Connecticut, however, limits bad faith claims to those involving fraud or improper motive. "Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive

another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Bad faith means more than mere negligence; it involves a dishonest purpose." Habetz v. Condon, 224 Conn. 231, 237-38 (1992) (citations and internal quotation marks omitted). Thus, applying Maryland or Connecticut law may lead to different results in assessing Lawrence's bad faith claim.

Because this action was brought in the District of Maryland, and was transferred to this Court pursuant to 28 U.S.C. § 1404(a), this Court must apply Maryland's choice of law rules. See Ferens v. John Deere Co., 494 U.S. 516, 523 (1990), Piper Aircraft Co. v. Reyno, 454 U.S. 235, 243 n.8 (1981), Van Dusen v. Barrack, 376 U.S. 612 (1964)). Lawrence argues that under Maryland's choice of law rules, Maryland law should apply because his injury took place in Maryland in that he, as a resident of Maryland, suffered economically in that state. See Philip Morris, Inc. v. Angeletti, 358 Md. 689, 746 (2000) (Maryland's choice of law rules "require a tort action to be governed by the substantive law of the state where the wrong occurred," which is "the place where the injury was suffered, not where the wrongful act took place."). At this stage of the proceedings, the factual record has not been developed sufficiently to determine where in fact the injury alleged here occurred. While Lawrence states

that he is a resident of Maryland, there are no allegations in the complaint about where he was doing business, which commissions he lost, and whether his economic injury can be linked to Maryland. In the absence of these facts, the choice of law question cannot be decided. Accordingly, the question of whether Lawrence has stated a cognizable claim of breach of the covenant of good faith and fair dealing must be deferred until the factual record is developed. Defendant's motion with respect to Count II is thus denied without prejudice to renew at the summary judgment stage.

C. Conversion

Lawrence's conversion claim alleges that TRG "wrongfully and with malice exercised dominion over Lawrence's compensation by failing and refusing, despite demand, to pay Lawrence the amount which TRGCT agrees is unpaid and due to Lawrence, the amounts set aside as unpaid and due to Lawrence, and/or the amounts of already collected sales commissions returned to Lawrence Registered Clients which also constituted the compensation due to Lawrence, all with the intent of depriving Lawrence of his compensation." Second Amended Complaint [Doc. # 27] at ¶ 64. Defendant argues that Lawrence has failed to state a conversion claim because he has not identified specific monies in which he had an ownership interest.

Conversion is defined similarly under both Connecticut and

Maryland law. In Maryland, "[a] 'conversion' is any distinct act of ownership or dominion exerted by one person over the personal property of another in denial of his right or inconsistent with it." Interstate Ins. Co. v. Logan, 205 Md. 583, 588-89 (1954). Likewise, the Connecticut Supreme Court defines conversion as "an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights." Macomber v. Travelers Property & Casualty Corp., 261 Conn. 620, 650 (2002); see also Label Systems Corp. v. Aghamohammadi, 270 Conn. 291, 329-332 (2004) (defining conversion as "some unauthorized act which deprives another of his property permanently or for an indefinite time; some unauthorized assumption and exercise of the powers of the owner to his harm. The essence of the wrong is that the property rights of the plaintiff have been dealt with in a manner adverse to him, inconsistent with his right of dominion and to his harm.") (citations and internal quotation marks omitted).

Under both Connecticut and Maryland law, the "general rule is that monies are intangible and, therefore, not subject to a claim for conversion. An exception exists, however, when a plaintiff can allege that the defendant converted specific segregated or identifiable funds." Allied Investment Corp. v. Jasen, 354 Md. 547, 564 (1999) (citations omitted); Macomber v. Travelers Property & Casualty Corp., 261 Conn. at 650 (plaintiff

must "point to specific, identifiable money to which they had a right, just as they must in order to support a conversion claim regarding any other type of chattel."); see also Allied Investment, 354 Md. at 565 ("conversion claims generally are recognized in connection with funds that have been or should have been segregated for a particular purpose or that have been wrongfully obtained or retained or diverted in an identifiable transaction.") (citation and internal quotation marks omitted).

Lawrence alleges that "certain compensation remains unpaid and due to Lawrence for investments in TRGCT Funds by the Lawrence Registered Clients, but despite demand, TRGCT has failed and refused to pay Lawrence said compensation undisputedly due to Lawrence." Second Verified Complaint [Doc. # 27] at ¶ 49. In addition, Lawrence alleges that TRG reduced, eliminated, or returned certain sales commissions that otherwise would have been paid by Lawrence Registered Clients who invested in TRG Funds. See id. at ¶¶ 41-42. Lawrence has neither alleged that he owned or at some point had possession or control of the monies he claims he is due, nor has he identified any particular transactions from which commissions due to him were not paid. Viewed in the light most favorable to plaintiff, the allegations at best describe an obligation of TRG to pay money, which fails to state a claim of conversion. See Macomber, 261 Conn. at 650; Allied Investment, 354 Md. at 566. Lawrence's claim is thus

distinguishable from that at issue in Label Systems, in which defendants were alleged to have deposited in their personal account insurance proceeds from a car accident involving plaintiffs' company car, which defendants drove, instead of using the proceeds for the repair of the car. The Connecticut Supreme Court determined that the plaintiff Label Systems' possession and control of the car gave them an ownership right to the insurance proceeds. Here, in contrast, Lawrence has failed to allege any possession or control over any identifiable commissions. In the absence of an ownership interest, Lawrence's claim of conversion must be dismissed.

IV. Conclusion

For the reasons dismissed above, defendant's Motion to Dismiss [Doc. # 28] is GRANTED in part and DENIED in part. Counts III, IV, and V of plaintiff's Second Amended Complaint are hereby dismissed.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 30th day of September, 2004.